United States District Court
Southern District of Texas
ENTERED
October 24, 2016
David J. Bradley, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

GLADIS MORALES AGUILAR,	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 1:16-cv-048
	§	
UNITED STATES OF AMERICA,	§	
Defendant.	§	

MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION

Before the Court is Defendant's Motion to Dismiss (hereinafter "the Motion" or "Defendant's Motion"). Defendant's Motion was pending during the transfer of this cause of action from the Eastern District of Virginia, where it was originally filed by Plaintiff. For the reasons stated herein, it is recommended that Defendant's Motion be GRANTED, in part, and DENIED, in part.

I. Background

On August 5, 2015, Plaintiff filed a complaint in the United States District Court for the Eastern District of Virginia. *See* Dkt. No. 1. Plaintiff alleged five claims relating to the treatment she received at the hands of the Defendant while in Customs and Border Protection (CBP) custody. *Id.* Specifically, Plaintiff alleged: (1) negligence; (2) negligent supervision; (3) intentional infliction of emotional distress; (4) abuse of process; and (5) assault and battery. *Id.* at 11, 12, 14, 16, 18.

Defendant then filed its instant "Motion to Transfer and Motion to Dismiss" Plaintiff's Complaint. Dkt. No. 8. The court in the Eastern District of Virginia granted the Motion in part, transferring the case to the Southern District of Texas, and denied a portion as moot. *See* Dkt. No. 28. In the meantime, Plaintiff voluntarily dismissed her abuse of process claim with prejudice. *See* Dkt. No. 23.

As noted above, Defendant's Motion was still pending. This Court notified the parties that the Motion would be considered after the parties filed the joint case management plan, or until the parties' counsel determined whether the Motion would stand on the briefing on record. *See* Dkt. No. 31 at 2. On May 23, 2016, the parties filed their joint case management plan. Dkt. No. 35. Defendant consistently responded to all topics of discovery by stating that the Motion should be considered prior to discovery, while adding the Court should stay issuance of a scheduling order and discovery pending a ruling from the Court. *See* Dkt. No. 35.

The Court issued a scheduling order following the initial pretrial conference held on June 6, 2016. *See* Dkt. No 37; Dkt. Minute Entry on June 6, 2016. Defendant made an oral request during the conference that the Court stay discovery because it did not feel a scheduling order was necessary until the Motion had been resolved. The parties were informed of the Court's intention to maintain an organized and timely resolution of the claims, and that the Government should formally move the Court to issue a stay of discovery if it believed that a stay was necessary. On June 21, 2016, the Government moved the Court for a stay of discovery. Dkt. No. 38. On October 5, 2016, the Government reurged their motion for a stay of discovery, in which Plaintiff joined. Dkt. No. 42. The Court issued an order granting the joint motion and setting a status conference on October 12, 2016. *See* Dkt. No. 45. During the conference held on October 12, 2016, Defendant clarified that, due to Plaintiff dismissing her abuse of process claim, it now argues only that Plaintiff's claims are foreclosed by her failure to state a claim. Dkt. Minute Entry on October 12, 2016. Defendant filed an Advisory further clarifying that Plaintiff's "paragraph 60(e)" claim would still lack subject matter jurisdiction. Dkt. No. 46 at 3.

II. Legal Standards

A party seeking to dismiss a complaint under Rule 12(b) must assert its defenses prior to filing an answer. *See* FED. R. CIV. P. 12(b). A court may not dismiss a claim under 12(b)(6) unless it is certain that the plaintiff cannot prove her factual allegations that support her claim that entitles her to relief. *See Bombardier Aero. Emple. Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough, P.C.*, 354 F.3d 348, 351 (5th Cir. 2003). Therefore, a complaint must contain sufficient factual matter that states a claim to relief that is "'plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citation omitted). Legal conclusions that are "naked assertions devoid of further factual enhancement" or "formulaic recitation of [a claim's] elements" are not enough. *Id.* Instead, factual allegations are facially plausible when they allow a court to draw a reasonable inference that the defendant is liable for the alleged misconduct. *Id.* However, when factual allegations are intertwined with the merits, i.e. where the allegations shed light to both the basis of federal court subject matter jurisdiction and the cause of action, a court should not dismiss the claims unless they are "immaterial or wholly insubstantial and frivolous." *See Clark*, 798 F.2d at 741. Finally, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable and 'that a recovery is very remote and unlikely.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

III. Discussion

Subject to the Federal Tort Claims Act (hereinafter "FTCA"), the United States is liable to claimants for injuries caused by United States' employees in accordance with the law of the state where the act took place. *See* 28 U.S.C. § 1346(b)(1). Therefore, Texas law applies.

i) Plaintiff's Negligence Claims

Defendant argues that Plaintiff's negligence claims should be dismissed as she fails to allege serious bodily injury, and her claims are conclusory and lack sufficient factual support. *See* Dkt. No. 9 at 17, 18. Specifically, Defendant argues that Plaintiff alleges only mental anguish, which is not cognizable in Texas absent an allegation of serious bodily injury. *Id.* at 18. Plaintiff argues that she alleged serious bodily injury; the pains associated from prolonged exposure to extremely low temperatures, sleep deprivation, hunger, stomach aches, and post-traumatic stress disorder. *See* Dkt. No. 16 at 15. Finally, even if she failed to allege serious bodily injury, Plaintiff argues that Texas law otherwise allows her to present the claims because her mental anguish caused physical manifestations of pain. *Id.* at 18.

Texas does not recognize a general duty to avoid negligent infliction of mental anguish. *City of Tyler v. Likes*, 962 S.W.2d 489, 494 (Tex. 1997); *Boyles v. Kerr*, 855 S.W.2d 593, 595-96 (Tex. 1993). Texas has, however, allowed for the recovery of emotional damages in almost all personal injury actions in which bodily harm befell the plaintiff. *See id.* at 405; *Fitzpatrick v. Copeland*, 80 S.W.3d 297, 302-03 (Tex. App. 2002). Further, Texas no longer requires mental anguish to physically manifest itself. *Verinakis v. Medical Profiles, Inc.*, 987 S.W.2d 90, 95 (Tex. App. 1998). Without bodily harm, there are only limited ways in which a plaintiff may recover for emotional damages. Specifically, in limited situations, a special relationship creating a duty of care will give rise to mental anguish damages without manifestations of a physical injury if the damages were foreseeable. *City of Tyler*, 962 S.W.2d at 496. However, most relationships, whether legal or personal, will not enable a plaintiff to recover solely for mental anguish. *Id.*

The types of relationships that qualify often involve positions of intense emotional trust or physical confinement. *See id.* (stating the physician-patient, funeral director-mourner, and railroad-passenger relationships give rise to such duties, but general intimate or landowner-invitee relationships do not); *Lions Eye Bank v. Perry*, 56 S.W.3d 872, 877 (Tex. App. 2001) (identifying three common elements of special relationships). Based upon Texas case law, it appears that the prisoner-guard relationship is a special relationship that gives rise to a duty of care to protect prisoners from harm. *See Salazar v. Collins*, 255 S.W.3d 191, 201 (Tex. App. 2008) ("[A]s a matter of law the requisite "special relationship" exists between inmates and TDCJ (and its employees)[,]. . . prison or jail officials owe a duty of reasonable care to protect inmates from harm when that harm is reasonably foreseeable."); *Leo v. Trevino*, 285 S.W.3d 470, 485 (Tex. App. 2006) ("[A] 'special relationship'. . . arises only where 'the state, by affirmative exercise of power, has custody over an individual involuntarily or against his will.'"); *Scott v. Britton*, 16 S.W.3d 173, 178 (noting that TEX. GOV'T CODE § 494.001 generally establishes a duty to provide safe confinement for inmates); *Ruiz v. Estelle*, 503 F. Supp. 1265, 1303 (S.D.Tex. December 12, 1980) ("State officials have a duty to protect inmates from violence and the reasonable *fear* of violence.") (emphasis added). Thus, Plaintiff's claims can proceed solely on allegations of mental anguish because, under Texas law, Plaintiff and the CBP had a special relationship that gave rise to a duty of care to protect Plaintiff from reasonably foreseeable harm.

As mentioned above, Defendant argues that Plaintiff's claims are conclusory and lack factual allegations to support her claims. Dkt. No. 9 at 21. In Texas, negligence requires proof of four elements: (1) duty; (2) breach of said duty; (3) injury to the person owed the duty; and (4) proximate cause. *Nelson v. Krusen*, 678 S.W.2d 918, 928 (Tex. 1984). At this stage, Plaintiff has fulfilled her initial burden under the applicable pleading standards. *See Twombly*, 550 U.S. at 556; *Garcia v. Niderhauser*, 2011 U.S. Dist. LEXIS 156880, at *27 (S.D.Tex. Aug. 5, 2011).

Plaintiff alleges that CBP officers and their supervisors neglected their duties to Plaintiff, resulting in harm. *See* Dkt. No. 1 at 11-14. For example, Plaintiff alleges that she was not provided basic toiletry supplies, such as soap and toothpaste, and that she was not provided an opportunity to bathe. *Id.* at 7. Further, Plaintiff alleges that the detention center was kept at extremely low temperatures, and she that was denied access to a blanket. *Id.* at 6. Further, Plaintiff alleges she suffered from sleep deprivation because CBP officers failed to provide basic bedding, kept bright lights on in her cell, forced her to "get up" for roll calls, and banged on the door loudly and yelling at detainees throughout the day. *Id.* Plaintiff claims that she suffered emotional distress from sleep deprivation, anxiety, depression, and post-traumatic stress disorder caused by the CBP officers' actions. *Id.* at 12, 14. She also argues the emotional distress caused physical manifestations though pain, hunger, and stomach aches. *Id.* at 12, 14. These factual allegations sufficiently support her negligence causes of action in order to survive a motion to dismiss. *See Garcia v. Niderhauser*, 2011 U.S. Dist. LEXIS 156880, at *27 (S.D.Tex. Aug. 5, 2011) (finding that while the allegations were conclusory, the plaintiff pled auxiliary factual allegations allowing his negligence claim to survive).

ii) Plaintiff's Assault and Battery Claim

Defendant argues that Plaintiff's claim fails because she does not allege either a harmful or offensive physical contact to her person or apprehension of a contact that fulfills that requirement. *See* Dkt. No. 9 at 27. Plaintiff argues that the contacts were sufficiently harmful or offensive and in close enough proximity to her person to constitute a battery despite not resulting in a physical touch. *See* Dkt. No. 16 at 26. Defendant argues that Plaintiff's allegations stretch the scope of Texas law, and that the "contact" Plaintiff alleges is too remote to fulfill the contact element of her claims. *See* Dkt. No. 19 at 20.

"Every day" or trivial contacts do not constitute an actionable battery. *See Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 803 (Tex. 2010). Relatedly, assault requires plaintiff to be placed in an apprehension of imminent bodily contact. *City of Watauga v. Gordon*, 434 S.W.3d 586, 589 (Tex. 2014). A contact must be "offensive" or one which is "contrary to all good manners[.]" *Id.* Further, actual physical contact is not necessary to constitute an assault or battery so long as there is some contact with clothing or objects closely identified with the body. *See, e.g.*, *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627, 629 (Tex. 1967) ("The intentional snatching of an object from one's hand is as clearly an offensive invasion of his person as would be an actual contact with the body."). The rule's rationale is that the essence of a battery is the offense to the dignity that occurs in an unpermitted and intentional invasion of one's person. *See id.* at 629-30.

However, the point in which an object "closely identifies with the body" is difficult to draw. Texas courts routinely find that only items touching the body in some fashion are sufficient. *See Fisher*, 424 S.W.2d 627 (a plate snatched from the plaintiff's hands); *Wal-Mart Stores v. Odem*, 929 S.W.2d 513, 521 (Tex. App. 1996) ("[I]f the jury accepted the testimony showing that Saenz only grabbed Odem's purse while she was holding on to it, and not any portion of Odem's body, the conduct would, nevertheless, constitute an assault[.]"). Further, Texas courts rely heavily on the Second Restatement of Torts when discussing the type of contact sufficient to constitute assault and battery. *See Fisher*, 424 S.W.2d at 629. The Restatement identifies that objects so connected as to customarily be regarded as part of the person, a cane or purse for example, as clear instances of sufficient contact not directly against the person. *See* Restatement of Torts 2d, § 18, Comment (c). The Restatement also identifies that the line is "felt" rather than rigidly defined, stating that if the tortfeasor "recognizes any object, however slightly or remotely attached to the other's person, as being so far a part of the other's personality that he can accomplish his purpose of offending the other by some contact with it, it is not unreasonable to regard the object in the same light and, therefore, to make the actor liable[.]" *Id.* Texas courts, then, relying on the Restatement, ordinarily find that a sufficient contact involves only items intimately attached to the body. Therefore, the Court looks to whether the CBP officer's "contact" touched an object in close proximity to Plaintiff with knowledge that the object was so intertwined with her person that the contact would be offensive to Plaintiff.

While the actions alleged by Plaintiff are troubling, the contact does not constitute a "contact" for purposes of an assault and battery claim. Plaintiff alleges that CBP purposefully: (1) maintained the holding cells at "painfully" low temperatures; (2) deprived Plaintiff of adequate nutrition and drinking water; (3)

maintained the holding cells in overcrowded, dirty, and unsanitary conditions; and (4) deprived the detainees of adequate sleep. *See* Dkt. No. 1 at 19. Even assuming Plaintiff's allegations as true, any "touch" or action is too far removed from the Plaintiff's person to be actionable as a battery. For example, maintaining low detention center temperatures would be an indirect touch to a thermostat or, more abstractly, the air around the Plaintiff. Further, adequate sleep and nutrition, for example, while important to the human body, is not an offense to "the person." Thus, Plaintiff has failed to allege conduct on the part of CBP that fulfills an element of assault and battery, and her claim should be dismissed.

iii) Plaintiff's IIED Claim

Defendant argues that Plaintiff's IIED claim violates two limiting principles enumerated by the Texas Supreme Court. *See* Dkt. No. 9 at 21. Specifically, Defendant argues that the claim is not cognizable under Texas law because Plaintiff has other avenues of recovery and that the actions alleged are not severe and outrageous enough, or do not properly allege purposeful conduct. *Id.* at 21-22. While Defendant correctly cites the applicable law, Defendant is mistaken in its application. For the reasons set forth below, Plaintiff's claim survives Defendant's Motion to Dismiss, and the allegations do allege cognizable actions on the part of CBP officers.

Texas has adopted the Restatement (Second) elements of IIED. *See Standard Fruit & Vegetable Co. v. Johnson*, 985 S.W.2d 62, 65 (Tex. 1998) ("[P]laintiff must prove that 1) the defendant acted intentionally or recklessly, 2) the conduct was 'extreme and outrageous,' 3) the actions of the defendant caused the plaintiff emotional distress, and 4) the resulting emotional distress was severe."). However, IIED is a "gap-filler" tort with the limited purpose of allowing recovery in the rare situations where a defendant intentionally inflicts severe emotional distress in an unusual manner that does not allow the victim any other recognized redress. *Hoffmann-La Roche, Inc. v. Zeltwanger*, 144 S.W.3d 438, 447 (Tex. 2004). Texas courts are clear to state that while IIED's purpose is to supplement existing forms of recovery for egregious conduct, it should not be extended to circumvent a limitation placed on the recovery of mental anguish damages under a more established doctrine. *See id.* Additionally, the conduct necessary for a finding of liability must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *See Vaughn v. Drennon*, 372 S.W.3d 726, 732 (Tex. App. 2012). Finally, the conduct must be the intended consequence or the primary risk of the actor's conduct. *Id.*

First, Plaintiff may allege other causes of action along with an IIED claim. Defendant cites multiple cases dismissing IIED claims while other avenues for recovery were available and there was factual overlap between the claims. *See* Dkt. No. 9 at 22. However, review of these cases was on direct appeal after judgment or on appeal of a motion for summary judgment, which is not the situation in this case. *See Hoffmann-La Roche, Inc.*, 144 S.W.3d at 442; *Draker v. Schreiber*, 271 S.W.3d 318, 322-23 (Tex. App. 2008); *Moser v. Roberts*, 185 S.W.3d 912, 914 (Tex. App.

2006). Assuming both claims share significant factual overlap and pertain to the same actions of the defendant, the IIED claim works only as a *supplemental* cause of action in rare circumstances where damages from egregious conduct would otherwise go unremedied. *See Hoffmann-La Roche, Inc.*, 144 S.W.3d at 447-48 ("Properly cabined, the tort simply has no application when the 'actor 'intends to invade some other legally protected interest,' even if emotional distress results.' . . . If the gravamen of a plaintiff's complaint is the type of wrong that the statutory remedy was meant to cover, a plaintiff cannot maintain an intentional infliction claim regardless of whether he or she succeeds on, or even makes, a statutory claim."); *Moser*, 185 S.W.3d at 915 ("[W]here the gravamen of a plaintiff's complaint is really another tort, IIED is not available as a cause of action."). However, on a motion to dismiss, courts look only to whether a plaintiff alleges enough factual matter to state a claim to relief that is plausible on its face. *See, e.g.*, *Iqbal*, 556 U.S. at 678-79. Therefore logic dictates that, so long as plaintiff alleges factual content sufficient to support both IIED and another cause of action, both claims would survive at this stage.

To find otherwise would place an almost insurmountable hurdle onto Plaintiff from the outset. In that world, a plaintiff would file a complaint with traditional causes of action and risk summary judgment due to the unique circumstances of her case that render relief impossible. Or, a plaintiff would file a complaint for IIED and risk summary judgment because she had other traditional avenues of recovery. In both situations, summary judgment would foreclose amendment, or a subsequent filing, of her complaint without meaningful development of the type of facts that would inform the litigants of the actual availability of a cause of action. As a "gap-filler" tort intended to supplement the rare existence of a lack of remedy, Texas courts likely do not expect plaintiffs to guess at how unique their case is without the benefit of at least some investigation of the factual issues. Thus, for situations such as these in which a plaintiff has alleged unique factual matters that thread a thin needle between negligent and intentional conduct and where reasonable jurists could disagree as to whether plaintiff has a traditional cause of action, a plaintiff needs to allege both causes of action or risk finding themselves barred from any relief. Thus, Plaintiff may allege and maintain both claims through a motion to dismiss.

Defendant also argues that the alleged conduct is not egregious enough to be cognizable, and that Plaintiff failed to allege that the conduct was intentional. Dkt. No. 9 at 23-24. Specifically, Defendant argues that the Court must consider all aspects of Plaintiff's detention in determining whether the conduct was sufficiently egregious. *Id.* Defendant, while correctly pointing to the applicable law, again fails in its application. As mentioned above, the conduct alleged must be "'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Hoffmann-La Roche, Inc.*, 144 S.W.3d at 445. Mere insults, indignities, or annoyances and trivialities are not enough. *Id.* As cited by Defendant, the court determines whether the defendant's conduct was extreme and outrageous in the first instance. *Id.* Yet, when reasonable minds may differ, the conduct's outrageousness in a particular case is a question for the jury. *Id.*

Based solely on the pleadings, the conduct is difficult to evaluate. There are strong arguments as to why the conduct could, or could not, be sufficient. For example, as Defendant states, Plaintiff was lawfully detained, and that detention alone and that short denial of some human comforts do not fulfill the requirements of extreme and outrageous conduct. *See Thomas v. Pankey*, 837 S.W.2d 826, 830 (Tex. App. 1992) (finding that missing one day's shower and recreation time was not sufficient). Further, as Defendant states, while Plaintiff alleges experiencing hunger, Plaintiff does admit that she was fed two to three times a day and had at least some access to water. *See* Dkt. No. 9 at 24; Dkt. No. 1 at 7. However, for example, Plaintiff also alleges that she was constantly cold to the point of shivering because the detention center was kept at extremely cold temperatures and she was not provided a blanket. Dkt. No. 1 at 6. Plaintiff also alleges that the cell was overcrowded, dirty, unsanitary, and that she was not provided basic hygiene products. *Id.* at 6-7. Plaintiff also alleges that she was watched by cameras while going to the bathroom. *Id.* Plaintiff also alleges that she was sleep-deprived because the CBP officers would constantly bang loudly on the doors, wake detainees by yelling, and force them to get up for head counting throughout the night. *Id.* at 6.

Many of these allegations, such as overcrowded cells, lack of sustenance, and shortage of water, would rise to mere indignities as pled. However, the allegations of unsanitary cells with no way to wash hands after using the bathroom, the extremely low temperatures within the holding cells coupled with the lack of blankets, and the sleep deprivation are troubling. These allegations, if true, describe conditions creating high risks for disease and injury. For this reason, the Court finds that Plaintiff has alleged conduct sufficient to move forward with her claims, but does not comment as to whether the conduct is in fact sufficiently outrageous. That may be resolved following an exchange of discovery by the parties or by a jury.

Plaintiff has also pled sufficient factual allegations that the conduct on the part of the CBP officers was intentional. While Plaintiff makes a conclusory allegation that the officers acted "intentionally and/or recklessly," she also alleges the conduct in detail. *See* Dkt. No. 1 at 6-7, 10, 11-12, 15. The types of conduct alleged, like banging on the holding cell doors to keep the detainees awake, taking away blankets, maintaining the detention center at abnormally low temperatures, or refusing to provide sanitary or medical supplies, show by their nature an intent to inflict harm or extreme discomfort. The detail presented by Plaintiff regarding the CBP officers' alleged conduct, when considered along with her conclusory statement, are sufficient under the general pleading standard. *See Iqbal*, 556 U.S. at 678 ("'[A] complaint [does not] suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement.'"); *Lovelace v. Software Spectrum*, 78 F.3d 1015, 1018-19 (5th Cir. 1996) (in the context of fraud, in which intent is subject to the general pleading standards, "[a] plaintiff will not survive a motion to dismiss. . . by simply alleging that a defendant had fraudulent intent. . . . Alleged facts are sufficient to support an inference [of intent] if they. . . identify circumstances that indicate conscious behavior on the part of the defendant.”). For this reason, the Court finds that Plaintiff properly alleged intent in her complaint.

Finally, Defendant argues that the United States has not waived sovereign immunity as to any false statements under paragraph 60(e) allegedly made by CBP officers. *See* Dkt. No. 9 at 16 (citing 28 U.S.C. § 2680(h)). As to this allegation, Defendant is correct. Despite the allegation appearing within her IIED claim, the allegation closely tracks the language of Plaintiff's abuse of process claim and more closely relates to those allegations than to intentionally caused mental anguish and the conditions of confinement. *See* Dkt. No. 1 at 15-18. For example, both claims allege that CBP agents falsely stated that Plaintiff was not afraid of returning to El Salvador. *Id.* at 15-16. Further, both claims allege that the CBP officers unlawfully refused to refer her to an asylum officer as required by law. *Id.* As paragraph 60(e) largely tracks and re-alleges the behavior alleged in the abuse of process claim, the Court finds that this allegation was encompassed within her voluntary dismissal of her abuse of process claim. In the alternative, it is recommended that Defendant's Motion be granted as to paragraph 60(e) for lack of subject matter jurisdiction.

In summary, the undersigned finds that: (1) that Plaintiff's properly alleged her negligence claims; (2) Plaintiff has not alleged a “contact” sufficient to uphold a assault and battery claim; (3) Plaintiff has properly alleged an IIED claim; and (4) paragraph 60(e) is encompassed within Plaintiff's voluntary dismissal of her abuse of process claim or, alternatively, that the Court lacks subject matter jurisdiction to consider that allegation. Thus, the Court recommends that Defendant's Motion to Dismiss be GRANTED, in part, and DENIED, in part.

IV. Recommendation

For the reasons above, it is recommended that Defendant's § 2255 Motion be GRANTED, in part, and DENIED, in part.

V. Notice to Parties

A party's failure to file written objections within fourteen days after being served with a copy of the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions that the district court accepts, provided that the party has been served with notice that such consequences will result from a failure to object. *Douglass v. United Services Auto. Ass'n*, 79 F.3d 1415 (5th Cir. 1996).

Signed on this 24th day of October, 2016.

Ignacio Torteya, III
United States Magistrate Judge